88-1483

No.

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of punitive damages in a civil case violates a defendant's right under the Eighth Amendment to the Constitution of the United States to be free from excessive fines where the award of punitive damages is approximately fifty times the actual damages determined to have been incurred by the plaintiff?

2. Whether an award of punitive damages against a defendant in a civil case is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?

3. Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a defendant's net worth prior to reaching a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?

4. Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. §§ 6b, 6c preempt state law which would otherwise apply to the conduct described in those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?

STATEMENT OF PARTIES

Plaintiff-Appellee in the proceeding below was David T. Jordan. Defendant-Appellant below was Clayton Brokerage Co. of St. Louis, Inc.[1] Martin Rachlin was a defendant in the proceeding below but was dismissed prior to trial.

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[1] Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc., ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

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DAVID T. JORDAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit, dated December 8, 1988, denying rehearing en banc and rehearing, is not officially reported, but is reproduced at Appendix A to this Petition. The Opinion of the United States Court of Appeals for the Eighth Circuit, dated October 17, 1988, is officially reported at 861 F.2d 172, and unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 24,346. A copy of that opinion is reproduced at Appendix B to this Petition.

The decision of the United States District Court for the Western District of Missouri, entered February 5, 1987, is not officially reported. That decision is reproduced at Appendix C to this Petition.

JURISDICTION

The decision of the Court of Appeals was entered on October 17, 1988. The Court of Appeals entered its Order denying a timely petition for rehearing en banc and denying a petition for rehearing on December 8, 1988.

This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

2. The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

3. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

U.S. CONST. amend. V.

4. Sections 4b and 4c of the Commodity Exchange Act (7 U.S.C. §§ 6b, 6c) provide in pertinent part:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made or to be made for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive . . . such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
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> * * *
>
> It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction in-

volving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a 'wash sale,' 'cross trade,' or 'accommodation trade,' or is a fictitious sale;

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

5. Section 14(a) of the Commodity Exchange Act provides in pertinent part:

Any person complaining of any violation of any provision of this Act . . . by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation."

7 U.S.C. § 18(a).

6. Section 22 of the Commodity Exchange Act provides in pertinent part:

(a)(1) Any person . . . who violates this Act or who willfully aids, abets, counsels, induces, or procures the

> commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions refered to in clauses (A) through (D) of this paragraph and caused by such violation. . . .

7 U.S.C. § 25.

STATEMENT OF THE CASE

This case arises out of a series of transactions in commodity futures contracts that occurred during 1980 and 1981. The transactions were all executed on boards of trade designated as "contract markets" by the Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5 of the Commodity Exchange Act, 7 U.S.C. § 7 (the "CEA").

Each transaction was executed by Petitioner Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") in its capacity as a futures commission merchant (an "FCM") registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. § 6f. Ostensibly, the transactions were being executed for the accounts of various of Clayton's customers, including Respondent, David Jordan. In fact, one of Clayton's associated persons,[2] Martin Rachlin, intentionally caused many of the transactions to be "switched" from the accounts for which they were originally supposed to have been executed to other accounts, including certain accounts opened by Rachlin in fictitious names and controlled by himself.

Through this "switching" of trades after they were executed, Rachlin was able to control, at least to some extent, the profitability of his (and his customers') accounts. Profitable trades

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[2] Pursuant to Section 4k of the CEA, 7 U.S.C. § 6k, any person associated with a futures commission merchant in a capacity which involves the solicitation or acceptance of customers' orders or the supervision of persons so engaged is to be registered as an associated person.

could be allocated to his personal accounts or, in order to placate dissatisfied customers, to their accounts from either Rachlin's personal accounts or the accounts of complaining customers.

In addition to (and, perhaps, to facilitate) this "switching" of trades, Rachlin secured trading authorizations (essentially limited powers of attorney permitting Rachlin to place orders for his customer's accounts on a discretionary basis)[3] from some of his customers, including Respondent Jordan. Utilizing Jordan's trading authorization, Rachlin churned Jordan's account.

As a result of Rachlin's misconduct, Jordan sustained losses amounting to $7,923.50. Jordan initiated suit in federal district court against Clayton and Rachlin, alleging that they had violated the antifraud provisions of the CEA, 7 U.S.C. § 6b, committed common law fraud, and breach of fiduciary duty.

The case was set for trial in the Spring of 1984. On the first day of trial, the court dismissed the jury and took the case off the docket to permit further discovery. On May 9, 1984, the Eighth Circuit Court of Appeals decided *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984), holding (among other matters) that state law remedies were not preempted by the CEA. Jordan filed two subsequent amended complaints, the second amended complaint being filed on or about July 25, 1985. Prior to trial of the claims asserted in the Second Amended Complaint, Jordan dismissed his claims against Martin Rachlin.

The case proceeded to trial on Jordan's claim against Clayton for fraud in violation of Section 4b of the CEA, 7 U.S.C. § 6b and common law breach of fiduciary duty. As to the later claim, Clayton had pled, as a defense, that the complaint failed

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[3] The use of trading authorizations is regulated by the CFTC pursuant to 17 C.F.R. § 166.2.

to state a claim upon which relief could be granted. The basis for that defense was that the Commodity Exchange Act preempted the state law relied on by the plaintiff as a theory of recovery. This point was not pressed in the District Court or the Court of Appeals because of the *Kerr* decision.

During the trial, Plaintiff was permitted (over the objection of Clayton) to present the jury with evidence of Clayton's net worth. The jury was also presented (over Clayton's objections) with a veritable mountain of evidence pertaining to Rachlin's misconduct in the handling of trades for customers other than Jordan.

When the case was submitted to the jury, the jury was instructed (again, over Clayton's objections) that it could award punitive damages against Clayton if it concluded, based on the preponderance of the evidence, that Clayton had engaged in the misconduct alleged. The jury returned a verdict in favor of Jordan on both counts for actual damages in the amount of $7,923.50. The jury also awarded Jordan $400,000.00 in punitive damages on the common law claim for breach of fiduciary duty.

Clayton's motions for judgment notwithstanding the verdict, for remittitur or for a new trial were overruled by the Court, and judgment was entered on the verdict. Clayton appealed to the U.S. Court of Appeals for the Eighth Circuit.

In a 2-1 decision, a panel of the Court of Appeals affirmed the judgment of the District Court. The court held (a) that the award of punitive damages in a ratio to the actual damages of 50-1 was not excessive as a matter of law, and (b) that Clayton's constitutional rights to equal protection and due process were not violated (i) by the submission to the jury of evidence of Clayton's net worth or (ii) by the jury instructions permitting the jury to award punitive damages against Clayton without

first determining that the evidence established Clayton's guilt beyond any reasonable doubt.[4]

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[4] Clayton did not raise the preemption issue in the Court of Appeals because the Eighth Circuit had already resolved that issue adversely to Clayton's position in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984). Because it is the practice of the Eighth Circuit that each panel of the Court is bound by the prior decisions of the Court, *see, United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert. denied*, 464 U.S. 934 (1983), raising the preemption issue would have been futile.

REASONS FOR ISSUANCE OF THE WRIT

The writ should issue because the questions presented by this case, individually and collectively, are issues of substantial importance that have not been, but ought to be, resolved by this Court. It is particularly apropos that they be considered in a context, such as that presented by this case, involving conduct subject to a full panoply of legislatively prescribed administrative, civil and criminal remedies and sanctions. In such a context, the Court can weigh the competing interests implicated by the procedural protections sought by Petitioner and the remedy afforded the Respondent in reference to a concrete standard: the procedures and remedies which Congress deemed appropriate for the conduct in question.

A. The Importance Of The Issues

1. Constitutional limitations on punitive damages generally.

The constitutionality of permitting civil juries to mete out punishment through punitive damage awards has long been questioned. Ghiardi & Kircher, *Punitive Damages: Law ans Practice,* § 3.01 (1985) (hereinafter "Ghiardi & Kircher"); *The Case Against Punitive Damages*, Defense Research Institute (1969). While the question is an old one, it has not received the careful consideration it deserves. In this case, for example, the issue of what limitations the Constitution imposes on the practice of permitting a civil jury to punish a defendant by means of punitive damages was decided on the basis that because punitive damages are civil in nature, a defendant against whom such an award is sought is not entitled to the protections afforded persons threatened with punishment under the criminal law. *Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 861 F.2d 172, 178 (8th Cir. 1988). This, apparently, has been the historical practice of courts. *See, e.g. Ghiardi & Kircher,* § 213; Morris, *Punitive Damages In Tort Cases*, 44 Harv.L.Rev. 1173, 1197 (1931).

The label placed on a proceeding, however, does not control the determination of what procedural protections must be afforded a defendant. *See, e.g. United States v. Ward*, 448 U.S. 242 (1980); *In Re Winship*, 397 U.S. 358 (1970); *In Re Gault*, 387 U.S. 1 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Boyd v. United States*, 116 U.S. 616 (1885). This principle dictates that the process of awarding punitive damages in civil cases be carefully examined to determine what procedural safeguards are required by the Constitution to be accorded defendants against whom a punitive damage award is sought.

Only last term, the Court noted the importance of such questions. *Banker's Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1651; 108 S.Ct. at 1655 (O'Conner, J., concurring). The urgency of resolving those questions is increasing with the passage of time.

As punitive damage awards increase in size and frequency,[5] their impact on society at large and the legal system increases. Because there are, at present, no clear guidelines by which the size of punitive damage awards are to be fixed in any given case, it is virtually impossible to predict the size of a potential punitive damage award. Comment, *Punitive Damages: The Burden of Proof Required By Procedural Due Process*, 22 U.S.F.L. Rev. 99, 114 (1987). The possibility of large punitive damage awards has, as it did in this case, encouraged protracted litigation over claims otherwise modest in their size. It has made it increasingly difficult for businesses and professionals to obtain insurance, and has induced many businesses to withdraw

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[5] *See, e.g.* Peterson, *Punitive Damages: Preliminary Empirical Findings*, The Institute For Civil Justice (Rand Corporation) (1985); Peterson, *Punitive Damages, Empirical Findings*, The Institute For Civil Justice (Rand Corporation) (1987); Sella, *The 10 Largest Jury Verdicts of 1988*, 75 ABA Journal 45 (March 1989).

from markets perceived to involve high risks of litigation. *Id.* at pp. 102-112. In this term alone, the Court has been asked to review at least 4 cases to determine the efficacy of the procedures that were followed in awarding punitive damages against defendants in private civil litigation.[6]

In view of the increasing frequency with which the issues arise and the increasingly high economic stakes involved in the cases in which the issues are raised, it seems probable that this Court, the lower federal courts, and the state courts will continue to be confronted with litigants pressing the constitutional issues raised by this case until this Court definitively resolves those issues.

2. Preemption of state law by the Commodity Exchange Act.

Like the constitutional issues pertaining to punitive damage awards, the question of whether the Commodity Exchange Act preempts state law insofar as that law would govern the conduct of persons engaged in commodity futures trading is a recurring

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[6] *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987), *cert. denied*, 57 U.S.L.W. 3486 (U.S. Jan. 24, 1989) (No. 88-157); *CNA Casualty of California v. Rouhe, petition for cert. dismissed pursuant to Rule 53*, 57 U.S.L.W. 3261 (U.S. Oct. 11, 1988) (No. 88-297); *Metromedia, Inc. v. April Enterprises, Inc., petition for cert. filed*; 57 U.S.L.W. 3353 (U.S. Oct. 14, 1988) (No. 88-625); *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-556).

issue in suits filed with lower federal courts as well as state courts.[7]

This Court first addressed the question in 1947, when it decided the case of *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247 (1947). In that case, the Court indicated that the

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[7] *See, e.g. Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987); *Point Landing Co., Inc. v. Rudolf Wolff & Co., Ltd.*, 795 F.2d 415 (5th Cir. 1986); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982); *Kelly v. Carr*, 691 F.2d 800 (6th Cir. 1980); *E.F. Hutton & Co., Inc. v. White*, 2 Comm. Fut. L. Rep. (CCH) ¶ 24, 314, (D. Mass. 1988); *Babst v. Morgan Keegan & Co.*, 1987 U.S. Dist. Lexis 7165 (E.D. La. 1987); *Cady v. A.G. Edwards & Sons, Inc.*, 648 F. Supp. 621 (D. Utah 1986); *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203 (N.D. Ga. 1985); *McCarthy v. Paine Webber, Inc.*, 618 F. Supp. 933 (N.D. Ill. 1985); *Mallen v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 605 F. Supp. 1105 (N.D. Ga. 1985); *Zieg v. Shearson/American Express, Inc.*, 592 F. Supp. 610 (E.D. Va. 1984); *Peavey Company v. Mitchell*, Comm. Fut. L. Rep. (CCH) ¶ 21,939 (W.D. Okla. 1983); *Taylor v. Bear Stearns and Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Vaccariello v. Financial Partners Brokerage, Ltd.*, Comm. Fut. L. Rep. (CCH) ¶ 21,874 (N.D. Ill. 1983); *Strobl v. New York Mercantile Exchange*, 561 F. Supp. 379 (S.D.N.Y. 1983); *Gonzales v. Paine, Webber, Jackson & Curtis, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 21,615 (S.D.N.Y. 1982); *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kansas 1979); *Poplar Grove Planting & Refining Co., Inc., v. Bache, Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Hofmayer v. Dean, Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978); *Poncy v. Shearson Lehman Bros., Inc.*, 20 Sec. Reg. L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987); *Rupert v. Clayton Brokerage Co. of St. Louis*, 705 P.2d 988 (Colo. Ct. App. 1985); *Zimmerman v. Merrill Lynch*, 283 S.E.2d 639 (Ga. Ct. App. 1981); *Sinclair & Co., Inc. v. Gurule*, 757 P.2d 225 (Idaho Ct. App. 1988); *Paine, Webber, Jackson, & Curtis, Inc. v. Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981); *WestLake v. Abrams*, 504 F. Supp. 337 (N.D. Ga. 1980); *Singer v. Clayton Brokerage Co. of St. Louis, Inc.*, 620 S.W.2d 720 (Tex. Ct. App. 1981); *Haines v. First Commodity Corp. of Boston*, [1980-82 Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.W.2d 557 (1978); *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637 (Tex. 1977).

provisions of Sections 4b and 4c of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, would probably preempt state law otherwise governing the conduct proscribed by those provisions, but that a savings clause appended to Section 4c of the statute precluded such preemption. *Rice v. Board of Trade,* 331 U.S. at 255.

In 1974, Congress amended the CEA by enacting the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (the "CFTC Act"). Section 402(c) of the CFTC Act, 88 Stat. 1413, repealed the savings clause which compelled the Court's conclusion, in the *Rice* case, that the Commodity Exchange Act did not preempt state law. That and other changes in the CEA resurrected the issue of preemption of state law by the CEA.

Since 1974, the issue of preemption has been discussed in numerous reported decisions,[8] which have, not unexpectedly, resolved the issue in disparate ways. *Compare, e.g. Kotz v. Bache Halsey Stuart, Inc.,* 685 F.2d 1204 (9th Cir., 1982) (no preemption); *Haines v. First Commodity Corp. of Boston,* [1980-82 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980) (CEA preempts state law); *Bache-Halsey-Stuart, Inc. v. Hunsucker,* 248 S.E.2d 567 (1978) (CEA preempts state statutory law but not common law); and *Poncy v. Shearson Lehman Bros., Inc.,* 20 Sec. Reg. & L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987). (CEA preempts state common law fraud claims based on negligence and breach of fiduciary duty and preempts state blue sky law).

The issue of preemption is recurrent principally because the remedies which Congress prescribed for conduct violative of the CEA limit persons injured by such conduct to a recovery of actual damages, *see* 7 U.S.C. §§ 18, 25, whereas the remedies for such conduct available under state law (to the extent that it is

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[8] See Note 7, *supra.*

not preempted by the CEA) typically permit the recovery of punitive or, in some instances, treble damages. *See, e.g. Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 861 F.2d 172 (actual damages of $7,923.50 awarded for violation of CEA, common law breach of fiduciary duty, punitive damages of $400,000.00 awarded under state law); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984) (actual damages of $21,942, punitive damages of $275,000 awarded under state law); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982) (punitive damages of $350,000 upheld under state law theory of recovery) *DeRauce, Inc. v. PaineWebber, Jackson & Curtis, Inc.*, 18 Sec. Reg. & L. Rep. (BNA) 775 (E.D. Wisc. 1986) (punitive damages of $20.5 million awarded under state law theory of recovery); *Singer v. Clayton Brokerage Co. of St. Louis*, 620 S.W.2d 720 (Tex. Ct. App. 1981) (treble damages recoverable under Texas Deceptive Trade Practices Act). To the extent that a defendant in a civil action predicated on conduct regulated by the CEA is successful in persuading the court in which the action is pending that the CEA preempts state law, that defendant markedly lowers the level of its exposure to a damage award. Consequently, it is reasonable to anticipate that the issue of preemption of state law by the CEA will continue to be raised by litigants and will continue to consume time and attention of the courts until it is definitively resolved by this Court.

The volume of private litigation arising out of commodity futures transactions is substantial.[9] Given recent disclosures of investigations into trading practices on the Chicago Board of

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[9] During 1986 and 1987, Commerce Clearinghouse reported decisions in 133 private civil actions in state and federal courts arising out of commodity futures trades. [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH), 1986-1987 Case Table. Although the Administrative Office of the United States Courts does not maintain a separate category for cases involving commodity futures trading, its records indicate that 6,080 civil cases involving securities, commodities, or exchanges were filed during 1986 and 1987. Annual Report of the Director of the Administrative Office of the United States Courts.

Trade and the Chicago Mercantile Exchange[10], that volume can only be expected to increase in the foreseeable future.

Congress has, of course, made an effort to relieve the burden of such litigation from the courts by establishing an administrative reparations procedure. *See* 7 U.S.C. § 18; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 384-386 (1982). While that procedure is actively utilized, the prospect of recovery of an award of punitive damages based on state law operates as an incentive to injured parties to resort to the courts to resolve their claims. As the history of this case illustrates,[11] such litigation is frequently protracted simply because of the presence of a claim for punitive damages.

Given the inconsistent ways in which the question of preemption has been answered to date, it is clear that a definitive resolution of the issue by this Court is warranted. Such a resolution will, of course, relieve the lower federal courts and the state courts of the need to repeatedly examine the question. If the question is resolved favorably to petitioner in this case, it will encourage claimants who would otherwise resort to the courts to rely on the expertise of the CFTC to resolve their disputes in administrative, rather than judicial, proceedings.

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[10] Jackson and Ricks, Cozy Ties: *Futures Propes Test Resolve of Congress to Deal with Traders,* Wall St. J., Feb. 2, 1989, at 1, Col. 6; Bailey and Rose, *Chicago Futures Investigation Targets Traders in S & P's 500 Stock-Index Pit.,* Wall St. J., Jan. 27, 1989, at 15, Col. 1; *Fraud Inquiry Leaves Host of Clients Wondering if They were Victimized,* Wall St. J., Jan 26, 1989, at 6, Col. 1; McMurray, Ros, & Bailey, *Chicago Futures Inquiry Issues 250 Subpoenas,* Wall St. J., Jan. 25, 1989, at 3, Col. 1.

[11] This case was initially filed in the District Court in 1982. It was not tried until 1987. In the interim, vast amounts of discovery were taken, not so much to develop evidence of the events and actions which directly affected Respondent's account, but rather to develop evidence of other, similar misconduct by Mr. Rachlin which was then used to support the claim for punitive damages. At trial, most of the five days of testimony were devoted to such evidence.

B. This Case Is An Appropriate Context In Which To Resolve The Questions Presented For Review.

In *Matthews v. Eldridge,* 424 U.S. 319 (1976) the Court held that in order to determine the procedures required to afford a defendant due process of law, it is necessary to weigh three competing interests: (1) the private interests that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest(s) through the procedures employed and the probability that increased procedures would lessen the risk of error, and (3) the Government's interest. *Id.* at 335. The principal difficulty in weighing these interests in private civil litigation is ascertaining what the Government's interest is in a particular case in order to weigh that interest. It is possible that, in a given case, the Government's interest may be in deterring and/or punishing conduct viewed as undesirable. *See,* Wheeler, *The Constitutional Case For Reforming Punitive Damage Procedures,* 69 Va. L. Rev. 269, 303-11 (1983). In other instances, the Government's interest may be in protecting participants in particular industries from, e.g., the economic havoc which may be wreaked by punitive damage awards. *See, e.g., International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) (punitive damages may not be recovered against labor union because of risk that financial resources might be impaired); *Gertz v. Robert Welch,* 418 U.S. 323 (1974) (because of chilling effect on speech, punitive damages in defamation cases may not be recovered unless proven by clear and convincing evidence). In many instances, the Government simply has not defined what its interest is. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988) (common law claim for bad faith refusal to pay insurance claim; no statutorily defined standard of conduct or sanction).

In this case, the federal government has clearly defined its interests in the conduct at issue. The CEA, as amended, provides a full panoply of remedies and sanctions for conduct, such as that at issue in this case, proscribed by Section 4b of the CEA, 7

U.S.C. § 6b. A person registered (as Clayton was) with the CFTC can be subjected to administrative, civil and criminal penalties for engaging in conduct like that at issue in this case. *See* 7 U.S.C. §§ 9 (administrative action to preclude trading on commodity futures exchanges, revoke registrations, and impose monetary penalties), 13(c) (criminal penalties of fines and imprisonment), 13 a-1 (civil actions to enjoin or restrain violations). Additionally, such persons may be forced to compensate those damaged by their conduct through administrative reparation procedures, *see* 7 U.S.C. § 18, or private civil actions, *see* 7 U.S.C. § 25; *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran,* 456 U.S. 353 (1982) (recognizing implied private rights of action for violations of the CEA).

The CEA provides specific procedures that must be followed in pursuit of such remedies and sanctions. *See, e.g.,* 7 U.S.C. § 9. It also prescribes the factors that must be considered in determining the amount of monetary penalties to be assessed for violations of the statute. 7 U.S.C. § 9a. Consequently, it is clear that Congress has already made a policy decision about what remedies and sanctions are appropriate for conduct of the type at issue in this case, and the procedures that should be followed in meeting out such sanctions and providing those remedies.

Moreover, we would submit that by preempting state law otherwise applicable to the conduct at issue, Congress has proscribed state governments from having any interest in the conduct at issue other than enforcement of the CEA.[12] Consequently, this case affords the Court with the opportunity to weigh all of the competing interests that must be accounted for in determining what procedural safeguards ought to be afforded defendants in civil actions in which punitive damages are sought.

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[12] Pursuant to Section 6d of the CEA, 7 U.S.C. § 13a-2(1), state officials are permitted to enforce the CEA, in some circumstances.

CONCLUSION

The jury in this case was permitted to decide, based on a preponderance of the evidence, whether Clayton had engaged in (or was responsible for) conduct violative of the Commodity Exchange Act and determine both the remedy (to the victim) and the sanction (against Clayton) for that conduct. Before it reached its decision whether Clayton had violated the statute, the jury was presented with evidence of Clayton's wealth. When it was charged with determining what sanction should be imposed upon Clayton, it was instructed to consider that wealth, but was not furnished with any guidance, apart from Clayton's wealth, as to what sanction would be appropriate for the conduct charged.

The consequence of this process was that the jury levied a $400,000 fine against Clayton—a fine fifty times the amount of the damages the jury found to have been sustained by the Respondent. This fine was established in reliance upon principles of state law, notwithstanding that Congress has established a pervasive regulatory scheme which, from all indications, was intended to occupy the field to the exclusion of state law.

The writ should issue to permit this Court to consider whether such manifest disregard for the procedures, remedies and sanctions prescribed by Congress violated Clayton's rights under the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States or the Supremacy Clause of the Constitution.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312-WM

David T. Jordan,
Appellee,

vs.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judge John R. Gibson did not participate.

Petition for rehearing by the panel is also denied.

December 8, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: January 13, 1988

Filed: October 17, 1988

Before HEANEY, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

HEANEY, Circuit Judge.

Clayton Brokerage Co. of St. Louis, Inc. (Clayton) appeals from the district court's judgment entered in accordance with a jury verdict awarding David T. Jordan compensatory damages of $7,923.50 and punitive damages of $400,000.00. We affirm.

I. BACKGROUND

On June 30, 1980, Jordan established a commodities futures trading account with Clayton. Prior to that time, Jordan had traded in commodities futures with several other firms and had lost money. Jordan's account with Clayton remained dormant until December of 1980 when he placed a trade and lost $677.50. Six weeks later, Jordan called Martin Rachlin, a Clayton broker and the branch manager of Clayton's Kansas City office. After some discussion, Jordan gave discretionary control over the account to Rachlin. The account, however, was never formally listed as discretionary in Clayton's records.

Rachlin began placing trades in Jordan's account in earnest on February 3, 1981. By March 13, 1981, Rachlin had placed a total of 94 trades in the account and had lost $7,923.50. The trades generated approximately $5,292.00 in commissions. While Rachlin was placing trades in the account, Jordan questioned him about the short term trading strategy he appeared to be following and the losses incurred in the account. Rachlin assured Jordan that he was an experienced trader and that some short term trading was necessary to take advantage of market trends.

When the equity in Jordan's account was depleted, Jordan received a margin call and notice that no further trading could take place in the account until the call was met. Jordan then contacted Rachlin to complain. Rachlin falsely responded that the notice was the result of a computer error. Rachlin then transferred into Jordan's account a number of profitable trades he originally placed in other accounts in order to regain Jordan's confidence, bring the account out of deficit status, and further trade the account. Jordan was unaware of this action because the confirmation slips sent to him did not indicate that

the orders had been switched into his account.[1] Eventually, Jordan closed the account and brought an action in federal district court alleging misrepresentation in violation of the Commodities Exchange Act, 7 U.S.C. § 6(b), and breach of fiduciary duty under Missouri common law.

At trial, Jordan proceeded on the theory that his losses were a small portion of those caused by a larger "plan" pursued by Rachlin and encouraged by Clayton's failure to take measures against Rachlin despite its knowledge of his actions. Pursuant to this plan, Rachlin gained discretionary control over an account and failed to record that control as required by company policy. Rachlin then excessively traded the account, generating large commissions for himself and Clayton, while establishing no coherent trading strategy. Rachlin also engaged in order switching. Rachlin switched some profitable trades into accounts he opened and controlled under fictitious names. More commonly, however, Rachlin switched orders in an effort to retain the confidence of investors, often bringing their accounts out of a deficit status in order to further trade them and generate additional commissions. If the customer complained, Rachlin misrepresented his skill and assured the investor that future trading would be profitable. Finally, if an investor complained directly to other Clayton employees, the investor was informed that his or her account was not listed discretionary and that, therefore, the losses were the investor's responsibility.[2]

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[1] The evidence at trial also indicated that on several occasions Rachlin switched into other accounts profitable trades originally placed in Jordan's account. Overall, however, Jordan's account posted a small net gain as a result of the order switching.

[2] Prior to trial, Clayton brought a motion in limine to exclude much of the "plan" evidence Jordan intended to introduce. After extensive briefing on the issue and a half day of oral argument, the district court substantially overruled Clayton's motion to exclude the evidence. The court did, however, limit evidence concerning four other Clayton customers, each of whom claimed to be victims of the larger plan, by prohibiting detailed testimony about the customers' account statements and trading transactions.

The jury found for Jordan on both claims and awarded him $7,923.50 in compensatory damages and $400,000.00 in punitive damages. Clayton then brought a motion seeking a reduction of the punitive damages award or, in the alternative, a new trial. The district court denied the motion. Clayton appeals on two grounds: (1) that the punitive damages award is grossly excessive in relation to the actual damages, and (2) that the punitive damages award is the result of prejudice caused by improper admission of testimony detailing the larger plan.

II. EXCESSIVENESS

Clayton argues that the punitive damages are plainly excessive. In particular, it cites the 50-1 ratio of punitive to actual damages as evidence of gross excessiveness. Clayton contends that under Missouri law, punitive damages in the range of 2-1 to 4-1 are reasonable. Jordan responds that the award is supported by the degree of malice shown and by Clayton's financial condition. Moreover, Jordan argues that the award is consistent with the punitive awards affirmed in *Kerr v. First Commodity,* 735 F.2d 281, 289 (8th Cir. 1984) (actual damages of $21,942.00 and punitive damages of $275,000.00) and *Wegerer v. First Commodity Corp.,* 744 F.2d 719 (10th Cir. 1984) (actual damages of $10,775.00 and punitive damages of $250,000.00).

We find *Kerr* instructive on this point. *Kerr* involved an action for commodities trading fraud against a commodities trading firm, brought pursuant to both federal law and Missouri state law. On appeal, the firm challenged the punitive award of $275,000.00 as excessive in light of the trial court's remittitur of actual damages from $75,000.00 to $21,942.00. This Court upheld the punitive award, stating:

> The degree of malice and the financial wealth of the defendant both are relevant in determining the proper amount of punitive damages. Missouri courts require a nexus between the wrong committed by the defendant and the

> amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. The jury has wide discretion in determining the amount of punitive damages, and that determination is not to be disturbed unless it is the product of bias or prejudice or is otherwise an abuse of discretion.

735 F.2d at 289 (citations omitted).

Thus, the fact that the punitive damages award in this case is significantly greater than the actual damages award does not, in itself, require reduction of the punitive damages. Rather, we must examine whether there is a sufficient nexus between the wrong committed by Clayton and the amount of punitive damages. *See Wheeler v. Community Federal Savings and Loan Assn.*, 703 S.W.2d 83, 88 (Mo. Ct. App. 1986) (upholding actual damage award of $500.00 and punitive award of $100,000.00 stating that "[t]he general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*").

In this regard, the district court stated in its Memorandum and Order:

> [T]he jury could have concluded reasonably that [Clayton] placed Martin Rachlin in a position where [Jordan] was encouraged to place his confidence in Rachlin; that Jordan was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence * * * placed in him resulting in substantial financial harm to [Jordan] and substantial financial gain to Rachlin and [Clayton]; that [Clayton] failed to supervise in any meaningful way Rachlin's handling of [Jordan's] account; that even when complaints about Rachlin were received, [Clayton] failed to investigate adequately; that [Clayton] ignored information it had that Rachlin was violating [its] regulations; and that because of [Clayton's] substantial net

District Court Memorandum and Order at 6-7.

We have independently reviewed the evidence presented at trial concerning Clayton's conduct and affirm the district court's finding that the evidence fully supports the punitive damages award. For example, we note that James W. Hanson, a broker with Clayton, testified that in 1979 and 1980, while he was branch manager of Clayton's Kansas City office, he investigated customer allegations that Rachlin engaged in discretionary and excessive trading in accounts listed as non-discretionary. As a result of the investigation, Hanson concluded that Rachlin "had been making unauthorized trades in [two] customer accounts." Transcript at 296. Moreover, he testified that he informed his superiors in Clayton's home office in St. Louis of his conclusion. Despite this information, Clayton relieved Hanson from his position as branch manager and promoted Rachlin to that position. Transcript at 183.

With respect to excessive trading, Leslie Jordan, an expert retained by Jordan, testified that of the 32 days on which Rachlin could have traded Jordan's account, the account was actually traded on 24 days. In total, 84 trades were executed, generating an average daily commission of $165.39.[3] The expert testified

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[3] The expert also testified that 70% of the trades in Jordan's account were "day trades." The expert stated that such trades are indicative of discretionary control of the account by the broker due to the extensive communication that would be required for the customer to engage in such trading. In addition, the expert testified:

> Q. What is the basic interest or objective of a person who's a speculator in the futures market?
>
> A. Hope to have trading profits that exceed your cost of doing business, which is your commissions.
>
> Q. Now, taking that interest or that objective and bearing it in mind, could the trading that you described here in Mr. Jordan's account in your testimony today meet or satisfy that objective?
>
> A. I think it is heavily weighed (sic) against that possibility. Part — because it was predominantly day trades, that means the only

that in order to simply pay the commissions the account would have had to generate profits of more than 182 percent per month. The record also contains testimony that Clayton normally received at least a portion of the trading commissions. Transcript at 408.

Concerning order switching, Martha LaQuey testified that shortly after she was fired by Rachlin, she met with Ralph E. Bradac, an employee with Clayton's compliance department in St. Louis, and informed him that Rachlin was engaged in order switching.[4] Transcript at 405. Bradac's deposition, parts of

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> profit that could be made was how much the market moved in that given day.
>
> The market moves in fixed limits. It can't go from $400 an ounce to $500 an ounce in a day. It can move from $400 an ounce to [$]410. If you are right, and bought early in the day when it was low and sold high, it still backs out how much you can possibly make in a given day. It must move more than the cost of doing commissions * * * .
>
> The problem with trying to make a profit with day trading is, that you got things stacked against you. First you have to overcome the commission cost, and then you have to have enough price move within the given time period to compensate for that and still give you a net overall profit.
>
> It's a technique that rarely produces a profit in speculative customer accounts that are paying full-commission rates.
>
> Q. Would you say that the trading in Mr. Jordan's account that has already been described was consistent with or was contrary to the basic interest of making a profit?
>
> A. I think having heavy concentration in day trades in a small speculative account, paying full commission, is a doomed strategy. The customer can't come out ahead. There are too many odds against him.

Transcript at 758-59.

[4] In contrast, Bradac's deposition reflects that the meeting did not occur until March 17, 1981, some four days after the last trade in Jordan's account and one day after Rachlin was fired.

which were read into the record at trial, indicates that he reported the conversation to Clarence Delbridge, then head of Clayton's compliance department. Bradac deposition at 127. In addition, the record establishes that even if Clayton had not been explicitly informed of the order switching, it had available to it computerized information from which it should reasonably have detected the order switching scheme. Delbridge deposition at 74-80; transcript at 300-05. Thus, the record contains ample evidence from which the jury could have concluded that Clayton knew Rachlin was engaged in the order switching scheme.

In sum, the record fully supports the district court's finding that Clayton's acts and omissions are sufficiently related to the injury suffered by Jordan to justify the punitive damages award.

III. PREJUDICE

Clayton also argues that the punitive damages award resulted from prejudice caused by improper admission of evidence concerning the larger plan. Specifically, it contends that the evidence was improperly admitted because, under Federal Rules of Evidence 403 and 404, its probative value was far outweighed by its prejudical and confusing effect on the jury. In this regard, Clayton points out that the bulk of the contested evidence concerns events that occurred prior to the trading activity in Jordan's account which are irrelevant to Jordan's claims. Clayton also argues that the single limiting instruction given the jury concerning the plan evidence was insufficient to overcome the prejudice caused by its admission.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, oppor-

tunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has had occasion to apply Rule 404(b) in a situation very similar to the instant case. In *Kerr v. First Commodity Corporation of Boston,* 735 F.2d 281, 286-88 (8th Cir. 1984), we considered a challenge to the trial court's admission of testimony of customers who were not parties to an action against a commodities futures trader. The customers testified that the trader defrauded them in a manner similar to that alleged by the plaintiff.[5] We affirmed the district court's admission of the testimony, finding that the evidence was properly admitted on the issue of punitive damages to show knowledge, intent and absence of mistake on the part of the trader. *Id.; see also Wegerer v. First Commodity Corporation of Boston,* 744 F.2d 719, 724 (10th Cir. 1984).

Although admission of "other acts" evidence carries with it the potential to confuse the ultimate issues to be determined by the jury and to unfairly prejudice a party, we note that under Rule 404(b) the trial court "has the duty to balance the probative force of the evidence against any possible prejudicial effect it might have on the jury." *Kerr,* 735 F.2d at 286. Moreover, the balance struck by the trial court will be overturned on review only on a finding of abuse of discretion.

Our review of the record indicates that the district court carefully considered the evidence concerning the larger plan and admitted it to show knowledge, intent and absence of mistake on the part of Clayton. The record also discloses that the trial court limited in some respects detailed testimony concerning the larger plan. Accordingly, we hold that the trial court did not abuse its discretion in striking the balance that it did.

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[5] In addition, we also considered a challenge to the district court's admission of two prior consent decrees entered against the trader.

In addition, the record reflects that early in the trial, Clayton brought up the subject of a cautionary instruction. In response, the court requested Clayton to prepare such an instruction and offered to hear argument on the content of the instruction and when it should be given. From Clayton's subsequent silence on the issue, we can only conclude that it decided, as a tactical matter, to request the court to give the cautionary instruction only with the other instructions at the close of the case.[6] In any event, we cannot say that the trial court's failure to give, sua sponte, a cautionary instruction during the course of the proceedings constituted an abuse of discretion.

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[6] The record reflects the following exchange concerning the cautionary instruction:

> [Counsel for Clayton]: You advised us earlier, I believe it was in connection with the arguments on the motion in limine, that you would give to the jury a cautionary instruction dealing with the evidence of activities relating to the other customers, customers other than Mr. Jordan.
>
> We've looked at that Eighth Circuit case that has, I believe in the footnote, a cautionary instruction that was given in that case. If you wish, we would be willing to draft a proposed cautionary instruction for your review, or I guess we are asking whether you have drafted such an instruction, or just what we should do on that.
>
> I think we are getting more and more into that type of evidence. We assumed we would not ask for that until right before the other customers started coming on the stand. But we are already getting into evidence about other customers.
>
> I think Ms. LaQuey will undoubtedly testify about other customer's accounts, and so it may be that we would be requesting that fairly quickly.
>
> The Court: What I propose you do * * * is prepare the form of instruction that you wish that I give, show that to [plaintiff's counsel], let them look at it, and then if there is some disagreement about either the instruction or when it should be given, we can take it up at one of our numerous times away from the jury.

Transcript at 333-34.

IV. CONSTITUTIONAL CHALLENGE

Finally, Clayton argues that the punitive damages award violates the due process and equal protection clauses of the United States Constitution. Specifically, it contends that jury instruction number four violated its due process rights because it set forth a preponderance of the evidence standard as the burden of proof for awarding punitive damages. Clayton objected to the instruction at trial and challenges the instruction on appeal on the ground that the punitive nature of the award requires proof beyond a reasonable doubt. In addition, Clayton contends that admission of evidence as to its net worth violated the equal protection clause because the evidence irrationally implies it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.

In essence, we understand Clayton's contentions to be grounded on *Bankers Life and Casualty Co. v. Crenshaw*, ____ U.S. ____, 56 U.S.L.W. 4418 (May 16, 1988). At the time Clayton filed its brief in this case, the Supreme Court had noted probable jurisdiction but had not yet decided *Bankers Life*.

In *Bankers Life*, the petitioner insurance company sought to challenge a jury verdict awarding the appellee 1.6 million dollars in punitive damages. The insurance company contended that the award violated the Eighth Amendment's prohibition of excessive fines. In addition, it claimed that the award violated the due process and the contract clauses. The Supreme Court, however, declined to reach the issues, concluding that they were not raised and passed upon in the prior state court proceedings. 56 U.S.L.W. at 4420.

Initially, we note that the equal protection claim raised by Clayton was not raised by the appellant in *Bankers Life*. Moreover, although the appellant in *Bankers Life* claimed that the punitive award violated the due process clause, the Supreme Court characterized the chief issue raised in the case as

"whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases." *Id.* Thus, it is clear that the constitutional challange to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in *Bankers Life*.

More importantly, however, Clayton cites no case other than *Bankers Life* in support of its constitutional claims. Contrary to Clayton's due process claim, punitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 371-72 (1970). (Harlan J. concurring).

Similarly, Clayton's equal protection challenge is without merit. Clayton argues that admission of evidence of its net worth improperly suggested it would be more appropriate to punish Clayton than to punish a defendant with a lesser net worth. Yet, the evidence was not admitted on the issue of whether to impose punitive damages, nor was the jury instructed to consider such evidence in that determination. Rather, the jury was instructed to award punitive damages only if it found in favor of Jordan on the compensatory claim and if it found Clayton's conduct was malicious. *See* Jury Instruction No. 12. Thus, admission of the evidence did not violate Clayton's rights under the equal protection clause.

Accordingly, we affirm the judgment of the district court.

ROSS, Senior Circuit Judge, dissenting.

I respectfully dissent from the opinion of the panel majority and instead would reverse and remand the case to the district court with directions to order a remittitur of at least $300,000 of the $400,000 punitive damages award. A remittitur is appropriate in this case for at least two reasons. First, the record discloses that Clayton Brokerage Services Company (Clayton) was at most negligent in failing to supervise and investigate Martin Rachlin's activities. The degree of malice exhibited by

Clayton does not justify the severity of the punitive damages levied against it.

Second, at a fifty to one ratio, the punitive damages award is so grossly excessive in relation to the actual damages that the award represents a plain injustice. The punitive damage award imposed in this case does not exhibit the requisite correlation to the injury inflicted and the cause thereof. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Cir. 1987).

Accordingly, I dissent from the majority opinion to the extent that it fails to find that the punitive damages award of $400,000 is excessive as a matter of law.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

David T. Jordan,
Plaintiff,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Defendant.

No. 82-1107-CV-W-9

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL

Defendant asserts 37 separate grounds for granting its motion pursuant to Rule 50, Federal Rules of Civil Procedure, for judgment notwithstanding the verdict or, in the alternative, its motion pursuant to Rule 59, Federal Rules of Civil Procedure, for a new trial.

Standards for Determining Motions for New Trial and Judgment Notwithstanding the Verdict

Despite the jury verdict in favor of plaintiff, judgment may be entered in favor of defendant if that is the only reasonable conclusion. *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). A motion for judgment notwithstanding the verdict challenges the sufficiency of the evidence to support the jury's verdict. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 194 (1940). In deciding whether to grant

defendant's motion for judgment notwithstanding the verdict, the Court should consider the evidence in the light most favorable to plaintiffs, assume that all conflicts in the evidence were resolved by the jury in favor of plaintiff, assume as proved all facts which plaintiff's evidence tends to prove, and give plaintiff the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977). The Court may not consider the credibility of the witnesses or the weight of the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp,* 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied,* 460 U.S. 1080, 103 S.Ct. 1767 (1983).

While a motion for judgment notwithstanding the verdict is addressed to the sufficiency of the evidence, a motion for a new trial invokes the discretion of the Court by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust. *Montgomery Ward & Co.*, 311 U.S. at 251, 61 S.Ct. at 194. The granting of a new trial rests within the discretion of the trial court. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972). A new trial should be ordered where the verdict was against the weight of the evidence or to prevent a miscarriage of justice. *Day v. Amax, Inc.*, 701 F.2d 1258, 1262 (8th Cir. 1983). A new trial should not be granted merely because the Court feels that another result was more reasonable. *Fireman's Fund Insurance Co.*, 466 F.2d at 186.

Application of These Standards to Defendant's Motions Judgment Notwithstanding the Verdict

Viewing the evidence in the light most favorable to the plaintiff and affording the plaintiff all reasonable inferences to be drawn from the evidence, a reasonable jury could have found in favor of the plaintiff. Therefore, defendant's motion for judgment notwithstanding the verdict is denied.

Motion for New Trial

Defendant argues that it should receive a new trial because 1) the verdict is excessive and contrary to the clear weight of the evidence; and 2) the excessive verdict resulted from erroneous admission of evidence relating to other customer accounts which were unrelated to plaintiff's account.

On November 24, 1986, the jury returned a verdict in favor of plaintiff and against defendant for actual damages in the amount of $7,923.50 on two counts submitted to it, i.e., plaintiff's claim for fraudulent misrepresentation under the Commodity Exchange Act, 7 U.S.C. §§ 1-24, and plaintiff's claim for breach of fiduciary duties under the common law of the state of Missouri. In addition to the actual damages awarded on the breach of fiduciary duties claim, the jury assessed punitive damages in the amount of $400,000. Defendant argues that the punitive damage award was excessive.

Because the excessiveness issue arises with respect to the state law claim, Missouri law governs. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 477 (8th Cir. 1977) (the damage award may not exceed "that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim."). *See also Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150-51 (8th Cir. 1984).

In Missouri, "[g]ranting a new trial on the ground of excessiveness of the verdict is equivalent to granting a new trial on the ground that the verdict is against the weight of the evidence.

Both involve the power of the trial court to weigh the evidence." *Pisha v. Sears Roebuck & Company,* 496 S.W.2d 280, 284 (Mo. Ct. App. 1973). *See also Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189, 191 (Mo. 1951); *Wisner v. S.S. Kresge Company*, 465 S.W.2d 666, 670 (Mo. Ct. App. 1971).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the future. *Wisner,* 465 S.W.2d at 669.

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

Id. (citations omitted).

In *State ex rel. St. Joseph Belt Ry. Co. v. Shain,* 341 Mo. 733, 108 S.W.2d 351 (Mo. 1937), the Court quashed its writ of certiorari to the Kansas City Court of Appeals thereby letting stand the lower court opinion that $4,000 punitive damages was not disproportionate to the actual damage award of $1. The Supreme Court quoted with approval the following from the opinion of the Kansas City Court of Appeals:

> *While it may be true that ordinarily a verdict for punitive damages should not be altogether disproportionate to the amount of actual damages returned,* yet, in this case, the verdict for actual damages of $1 only was returned under the instructions of the court, for the reason of plaintiff's inability to introduce competent evidence of greater damages; and therefore the actual damages assessed furnish no proper guide for the amount of the punitive damages to be returned. Especially is this so as there is am-

> ple evidence in the record justifying a liberal award of punitive damages, and the inferences therefrom should not be limited and restricted by an arbitrary assessment of actual damages.

Shain, 108 S.W.2d at 365 (emphasis added).

In later cases, Missouri courts have cited *Shain* for the proposition that the punitive damages awarded must have some reasonable relation to the injury inflicted on the plaintiff. *See, e.g., Wisner,* 465 S.W.2d at 669 and *Holcroft v. Missouri-Kansas-Texas R. Co.,* 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). "The general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*" *Wheeler v. Community Federal Savings & Loan,* 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) (emphasis in original).

Based on the foregoing, Missouri does not require a direct proportional relationship between the actual damages awarded and the amount of punitive damages. However, Missouri does require that there be "some reasonable" relationship between the injury inflicted on the plaintiff and the amount of punitive damages.

In determining whether $400,000 is "altogether disproportionate" to the injury inflicted on the plaintiff:

> [A] review of the many cases awarding exemplary damages discloses that a hard and fast rule for the measuring of such damages cannot be declared. Each case turns more or less upon its own peculiar facts. The character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant are elements which should be taken into consideration in awarding damages of this character [citation omitted], and the amount may be such as would serve to deter the occurrence of like acts in the future.

Wheeler, 702 S.W.2d at 87 (quoting *Sperry v. Hurd,* 267 Mo. 628, 185 S.W. 170, 174 (1916)).

The amount of punitive damages necessary to punish and deter cannot be precisely measured.

> Necessarily, the amount of punitive damages to effect punishment and determent can not be measured with mathematical preciseness. But this does not mean that juries have carte blanche in awarding punitive damages. Attendant circumstances, including mitigating as well as aggravating circumstances, must be taken innto consideration, and the amount must be equated to the degree of malice, criminality or contumely characterizing the actor's conduct for which punishment or determent is deemed necessary.

Pisha, 496 S.W.2d at 284-85.

The financial worth of the defendant is an important factor for the jury to consider in arriving at an approximate punitive damage award. "Punitive damages have often been referred to as 'smart' money and it takes only slight consideration to realize that an amount of damages which might 'smart' one defendant might be entirely inconsequential to another." *Wisner,* 465 S.W.2d at 669-70.

Here, the jury could have concluded reasonably that defendant placed Martin Rachlin in a position where plaintiff was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence plaintff placed in him resulting in substantial financial harm to plaintiff and substantial financial gain to Rachlin and defendant; that defendant failed to supervise in any meaningful way Rachlin's handling of plaintiff's account; that even when complaints about Rachlin were received, defendant failed to investigate adequately; that defendant ignored information it had that Rachlin was violating defendant's regulations; and that because of defen-

dant's substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by defendant in the future. As in *Shain,* the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not "altogether disproportionate" to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

Defendant's argument that the punitive damages awarded were so large as to indicate an improper motive on the jury's part requires that defendant demonstrate some error ocurred during the course of the trial that caused the jury to ignore the evidence and instructions. *Parks v. Consolidated Aluminum Co.*, 679 S.W.2d 348, 352 (Mo. Ct. App. 1984). Defendant argues that evidence about the complaints of other customers of Martin Rachlin and evidence about the manner in which Rachlin handled other customers' accounts was irrelevant and unfairly prejudiced and confused the jury. Defendant argues that the cumulative effect of plaintiff's other bad act evidence caused the jury to award $400,000 in punitive damages.

I was concerned during the trial that if plaintiff called all of the witnesses scheduled, the cumulative effect of plaintiff's "other account" evidence might deprive defendant of a fair trial. However, now that the trial is completed, I do not believe that defendant was deprived of a fair trial as a result of the admission of that evidence. Plaintiff's scaled down presentation of evidence about other accounts plus the instructions to the jury avoided the unfairness of excessive other acts evidence. Therefore, defendant has failed to show that anything happened during the trial that would have caused the jury to ignore the evidence and the instructions in awarding punitive damages.

For the foregoing reasons, it is hereby ORDERED that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are denied.

/s/ D. Brook Bartlett
United States District Judge

Kansas City, Missouri

February 5, 1987.